

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

A+B HVAC SERVICES, INC.

and

Case Nos. 22-CA-093446
22-RC-089630

SHEET METAL WORKERS LOCAL
UNION 25

Eric Sposito, Esq. and Nancy Slahetka, Esq.
for the Acting General Counsel
Alan I. Model, Esq. (Littler Mendelson, P.C.),
of Newark, New Jersey, for the Respondent
Bennett D. Zurofsky, Esq. (Zurofsky Law),
of Newark, New Jersey, for the Charging Party

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case No. 22-CA-093446, filed on November 19, 2012 and amended on January 30, 2013 and July 8, 2013,¹ by Sheet Metal Workers Local Union 25 (“Local 25” or “the Union”), an Order Consolidating Cases, Amended Complaint and Notice of Hearing (the “Complaint”) issued on June 13, 2013. The Complaint alleges that A&B HVAC Services, inc. (“A&B” or “Respondent”), violated Section 8(a)(1) of the Act by interrogating employees regarding their Union membership, activities, and sympathies, threatening employees with unspecified reprisals if they supported the Union or engaged in activities on its behalf, and soliciting complaints and grievances, promising employees increased benefits and improved terms and conditions of employment if they did not support the Union or engage in Union activities. Respondent filed an answer denying the Complaint’s material allegations. This case was tried before me on July 10 and 11, 2013, in Newark, New Jersey.

¹ After the close of the direct case presented by the Acting General Counsel (“General Counsel”), I granted General Counsel’s motion to amend the Complaint to allege that on July 8, 2013, Local 25 filed an amended charge alleging that Respondent violated Section 8(a)(1) of the Act on September 26, 2012 by soliciting employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment if they did not support the Union or engage in activities on its behalf. This same allegation had appeared in the Complaint issued on June 13, 2013, so that there was no prejudice to Respondent in the preparation or presentation of its case. See *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171-1172 (2006).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of the parties made at trial and in their post-hearing briefs, I make the following

5 Findings of Fact

I. Jurisdiction

10 At all times material to the complaint's allegations, Respondent has been a corporation with an office and place of business in Somerset, New Jersey, and is engaged in the business of providing commercial HVAC installation services. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent admits and I find that at all material times Local 25 has been a labor organization within the meaning of Section 2(5) of the Act.

15 II. Alleged unfair labor practices

A. Respondent's Operations

20 Respondent is a mechanical contractor which performs heating and HVAC air conditioning services for commercial entities, including the installation of duct work, piping, and insulation. Atulesh Gupta has been Respondent's owner and President since July 2001. Respondent admits and I find that Gupta is a supervisor within the meaning of Section 2(11) of the Act. Arturo Yanez is a supervisor, and reports to Gupta. Reza or Ray Hadiyan is an owner of a business called Mechanical Degrees; the parties stipulated and I find that as of September 25 26, 2012 Hadiyan was an agent of Respondent within the meaning of Section 2(13) of the Act. Gupta and Yanez testified on behalf of Respondent at the hearing.

30 Respondent employs sheet metal workers in order to perform its installation services. Terrell White, Levie Steele, and Daniel Martinez, who testified at the hearing on behalf of General Counsel (White) and the Charging Party (Steele and Martinez), are sheet metal workers who were employed by Respondent. James Harper, an organizer with Local 25 who organized Respondent's employees and filed the petition for a representation election discussed below, also testified at the hearing for the Charging Party.

35 B. The Representation Election

40 On September 20, 2012,² Local 25 filed a petition for a representation election in Case No. 22-RC-089630, and on October 5, the Acting Regional Director approved a Stipulated Election Agreement involving the following unit:

45 All full-time and regular part-time sheet metal workers employed by the Employer at its Somerset, New Jersey location, but excluding all office clerical employees, temporary agency employees, managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Pursuant to the Stipulated Election Agreement, unit employees eligible to vote were those employed during the payroll period ending September 30.

50 _____
² All subsequent dates are in 2012 unless otherwise indicated.

A secret ballot election was subsequently conducted on November 15, under the direction and supervision of the Acting Regional Director.³ Subsequent to the election, the parties entered into a stipulation agreeing that one of the challenged voters, Terrell White, was ineligible, and that White's ballot should remain unopened and uncounted. The Tally of Ballots, revised pursuant to this stipulation, revealed the following results:

Approximate number of eligible voters	7
Void ballots	0
Votes cast for Petitioner	1
Votes cast against participating labor organization	1
Valid votes counted	2
Challenged ballots	5
Valid votes counted plus challenged ballots	6
Sustained Challenged ballots (voter ineligible)	1

Challenges are sufficient in number to affect the results of the election.

On November 20, the Union filed objections to conduct affecting the results of the election, and on May 9, 2013, the Regional Director issued a Report on Challenged Ballots and Objections and Notice of Hearing. In his Report, the Regional Director found that the portion of the Union's objection to conduct affecting the results of the election contending that Respondent interrogated and threatened employees regarding their union activities in violation of the Act was the same as certain allegations contained in the complaint in Case No. 22-CA-093446. The Regional Director therefore consolidated the representation and unfair labor practice cases for trial.

C. Facts Pertinent to the Complaint's Allegations

Terrell White began working for Respondent in July 2011, and left his employment to take a position elsewhere on October 15, 2012. White has been a member of Local 25 for about 16 years, and collected signatures on collective bargaining authorization cards during the Union's organizing campaign. Gupta and Yanez have been aware of White's membership in Local 25 since the inception of White's employment.

White testified that on September 26, Gupta called him while he was working at a jobsite, and asked him to come to the company's office. After finishing his shift, White met with Harper prior to going to Respondent's office, and told him that Gupta had called him in for a meeting, which White anticipated would address an expense issue, the petition, or both. Harper asked White to record the meeting, and White agreed.

When White arrived at Respondent's office, he was directed by Gupta to have a seat in the conference room. White went to the conference room, and proceeded to record his conversation with Gupta and Hadiyan.⁴ Gupta entered the room first, and he and White chatted about the jobs that White was working on. Hadiyan then entered, and the three began discussing an ongoing issue involving White's compensation. White testified that when he had

³ The election was originally scheduled for November 1, but was postponed due to the aftereffects of Hurricane Sandy.

⁴ The recording made by White was admitted into evidence as General Counsel Exhibit 6, and a transcript of the recording and certification were entered into the record as General Counsel Exhibits 7 and 8, respectively.

originally been hired, he had been told that he would receive \$125 per week for general expenses, including gas, tolls and mileage. However, White had not consistently received that amount, and had raised the issue with Gupta in the past. G.C. Ex. 7, p. 7-20. After discussing White's compensation for expenses, Hadiyan told White that Yanez was his supervisor, and he should follow Yanez's direction. The conversation then proceeded as follows:

HADIYAN: Arturo [Yanez] asks you to do something, do it for him. That's all it is to it. Let the guy know, the[] guy's communicated with you.

MR. WHITE: You would know if I didn't, you know – you know, take, you know, orders well. I'm never like that, you know. I have no problems with that.

HADIYAN: You do. And I'm telling you that sometimes we don't even realize it ourselves when we are unhappy. Sometimes we do things without really realizing it. And again, the reason that I asked so we could talk in here, is we want to find out why is it that you're unhappy. Is there anything that we could do? And I prefer to have somebody who is happy in here –

MR. WHITE: Mm-hmm.

HADIYAN: -- to work for us than somebody that – that's not happy, even though I got – we got to finish up these projects. But I prefer for that person not being here if they're not happy. If they don't want to – if they don't want to work for us, I don't want to force anybody to stay here and work for us.

MR. WHITE: Right.

HADIYAN: All right. So –

MR. GUPTA: Do you have any other issues besides this?

MR. WHITE: I – no. I just – I got \$95 and I thought I was supposed to get – supposed to get 125, and that was pretty much it. You know, but I didn't –

HADIYAN: Whatever you put in, that's what you're going to get.

G.C. Ex. 7, p. 21-22.

After a brief discussion of a lost pump at the BAPS project, Hadiyan returned to the topic of White's job satisfaction:

HADIYAN: Right. So tell me, is there anything else that you're unhappy about?

WHITE: No. I'm fine.

HADIYAN: Terrell, I'm going to be honest with you, I don't have much time in the day. He doesn't have that much time in the day. We would be happy to sit down and talk to you at any time you want to, though. Well, not just with you, with anybody else in here.

MR. WHITE: Sure.

HADIYAN: But all I want to hear out in the field, I want to hear positive things.

MR. WHITE: Sure.

5 HADIYAN: All right. The next meeting, again, I'm going to be frank with you, we're not going to sit down her and talk about these things again, okay?

MR. WHITE: Sure

10 HADIYAN: Because it's a waste of your time, waste his time, waste of my time.

MR. WHITE: Sure.

15 HADIYAN: So if you got any issues, you got any problem, call me, call him, talk to him. Call Atul mostly, because I'm not really involved with the –

MR. GUPTA: Certainly. Any – issues beside –

20 HADIYAN: If you have issues –

MR. GUPTA: -- that you may have something that you want to tell us that hey, we should be doing this way, that way, certain ideas that you have that you want to implement, you think is better for the Company and better for you, we are here to listen to those ideas.

25 And as you said, we are all busy, and sometime we look, like, we look only this way.

MR. WHITE: Yeah.

30 MR. GUPTA: We cannot look t his way. You guys are our eyes and ears outside. And if you have some suggestions or – we can always consider them and see if we can implement them.

35 We have – everybody is here. If the Company makes money, you make money. Company doesn't make money, nobody makes money.

G.C. Ex. 7, p. 25-26.

40 Hadiyan then turned the conversation to White's dealings with the Union:
HADIYAN: Have you heard anything from the Union? Either they're busy? They're not busy? Have they called you?

MR. WHITE: Not heard. They don't call you. That's not – that's not their way.

45 HADIYAN: Nothing, huh? How about your other friends, they – are they busy?

MR. GUPTA: Jerome and Zeev (ph) are working – he already is doing something else.

50

MR. WHITE: I don't know, I think they're back. I don't know for sure, maybe it's off and on. But for the most part, you know, maybe. You know. Yeah, I don't know exactly, we don't speak every day.

5 HADIYAN: Would you go back if they called you? I'm telling you now that you would be crazy if you don't go back.

MR. WHITE: I don't know. I don't know.

10 HADIYAN: Well, you still pay your dues, though?

MR. WHITE: I don't know.

15 HADIYAN: You haven't paid your dues?

MR. WHITE: I'm telling you, I don't know. You know, there's certain things got set up –

20 HADIYAN: Don't you have to pay your dues every month?

MR. WHITE: Yeah, you can. But you can also, you know –

HADIYAN: Freeze it?

25 MR. WHITE: -- take it with withdrawal. Yea, freeze it.

HADIYAN: But you haven't done – you haven't done any of it?

MR. WHITE: There's different ways you can do it.

30 * * *

HADIYAN: Which way have you done it?

35 MR. WHITE: It's no big deal. I mean, it's just – that don't affect this job either way, what I do with the Union, right? Does that affect this job?

HADIYAN: No, doesn't have any effect. But how would you do it? How would you take – keep on doing it? You have to pay your dues, don't you?

40 MR. WHITE: Sure.

HADIYAN: But you –

45 MR. WHITE: Every member pays.

HADIYAN: So every month you pay for it or you don't?

50 MR. WHITE: I pay – I pay in a lump sum.

G.C. Ex. 7, p. 27-29. Hadiyan went on to briefly question White regarding union medical benefits, before turning the discussion again to specific jobs White was working on. The entire meeting lasted for about 45 minutes.

5 *D. Facts Pertinent to the Challenged Ballots*

The ballots of Levie Steele, Daniel Martinez, and Michael Estok were challenged at the election because their names did not appear on the *Excelsior* list of eligible voters. Steele, Martinez, and Estok were laid off on October 19, after the payroll eligibility date but before the election took place. The Union contends that Steele, Martinez, and Estok were temporarily laid off, and therefore eligible to vote, so that their ballots should be opened and counted.⁵ Respondent contends that Steele, Martinez, and Estok were permanently laid off, and ineligible.

Gupta testified that the economic downturn in New Jersey has had a detrimental impact on Respondent's business over the past few years. Gupta stated that many people who were out of work were opening their own businesses, resulting in increased competition and difficulty in obtaining large jobs. Gupta testified that the company's revenue was down and cash flow was suffering as a result. Gupta testified that these economic conditions had necessitated layoffs, and that he had decreased the staff from the 11 employees working prior before the most recent recession. Gupta testified that in October, he decided to permanently layoff 3 of the 6 installers employed by the company because he had insufficient work to continue employing them on a full-time basis. Gupta testified that he selected Steele, Martinez, and Estok for layoff because they were the three least senior installers. Gupta selected a Friday, October 19, as the date for the layoffs, based upon the work flow at the time.

Prior to communicating with the employees regarding his decision to lay them off, Gupta contacted his labor counsel, Alan I. Model, Esq., to ensure that the layoffs were effectuated in a manner that would not engender challenges and objections in the context of the representation election. Model sent Gupta a script to follow, which Gupta reviewed several times, stating in part, "At this point, your job with A&B has come to an end. If the economy turns around and we get more work, we will advertise for employees to do the work. If you apply, of course we will consider you for work at that time." R.S. Ex. 3. The script also states that Respondent would make an effort to expedite the employees' applications for unemployment insurance benefits.

Gupta then called Yanez, and explained to him that Respondent would be permanently laying off three employees that day. Gupta told Yanez that he had selected Steele, Martinez, and Estok for layoff based upon their low seniority. Gupta explained that he would be sending Yanez a script to follow when communicating the layoff to Steele, and told Yanez to follow it. He then sent a copy of Model's script to Yanez.

⁵ The Union had also alleged in Case No. 22-CA-093446 that Steele, Martinez, and Estok were discharged in retaliation for their union activity, in violation of Sections 8(a)(1) and (3) of the Act. This allegation was dismissed by the Regional Director, Region 22, by letter of April 29, 2013. In his Report on Challenged Ballots and Objections, the Regional Director overruled as a result the portion of the Union's objection based upon the allegedly unlawful discharges of Steele, Martinez, and Estok. While the amended charge filed on July 8, 2013 also alleges that these employees were unlawfully discharged, General Counsel specifically disavowed this allegation during the hearing.

At the hearing, the Union withdrew its challenge to the eligibility and ballot of Arturo Yanez.

Yanez testified that after speaking with Gupta and receiving the script he went to the BAPS jobsite in Robinsville at approximately 1 p.m., where he spoke with Steele in the mechanical room on the second floor. Yanez testified that he told Steele that Steele was a good worker, but unfortunately the company had run out of work and had to let him go. Yanez told Steele that he should file for unemployment benefits, and Respondent would complete the paperwork necessary for him to receive them. Finally, Yanez told Steele that if Respondent had more work in the future they would advertise, and Steele would be welcome to reapply. Yanez stated that there was no discussion as to the duration of Steele's layoff, because there was no way to know when business would pick up, and that he did not tell Steele that the company would contact him about returning to work.

Steele also testified regarding the conversation with Yanez. Steele confirmed that Yanez told him that work was "slowing down" so that Respondent needed to lay off three employees, and said that Steele was a good worker. According to Steele, however, Yanez told Steele that "when things pick back up, we'll give you a call" (Tr. 121). According to Steele, Yanez did not mention anything about applying for unemployment benefits during the conversation.⁶

Gupta testified that at approximately 3 p.m. he took the script and went to Respondent's MTF jobsite in Edison, New Jersey, where Martinez and Estok were working.⁷ Gupta spoke to Martinez first and then to Estok, with Yanez present. Gupta testified that he told Martinez and Estok that there was only a little work left to be done at the jobsite, and there was no additional work on the horizon. Gupta said that as a result he had to lay Martinez and Estok off, as of that day. Gupta offered the employees references, telling them they were good workers. Gupta told them that in the future if Respondent obtained additional jobs and had more work he would advertise, and they were welcome to reapply. Gupta also told Martinez and Estok that Respondent would not challenge their applications for unemployment benefits, and would deal with their applications promptly. Gupta testified that he did not give the employees a specific duration of the layoff, or tell them that the company would call them back.

Martinez confirmed that Gupta and Yanez told him that Respondent was laying people off because there was no additional work, and that employees were being selected for layoff based upon seniority. As a result, Martinez, Steele and Estok, the last three employees hired, were being laid off. Martinez confirmed that Gupta and Yanez told him that he had done a good job. Martinez testified that Gupta and Yanez told him that he "could try in another month, call then and see...if they got any work, I could reapply then...if they get busy again, I could reapply then" (Tr. 133-134).

III. Analysis and Conclusion

A. Statements Allegedly Violating Section 8(a)(1) of the Act

General Counsel and Charging Party contend that Gupta and Hadiyan's statements to White during their September 26 meeting included an unlawful solicitation of grievances and

⁶ Steele testified that he had been laid off by Respondent previously in March, and was told at that time that when work picked up he would be called back by the company. However, Steele also testified that prior to returning to work in September, he called Hadiyan to see whether Respondent had work available.

⁷ Gupta testified that he personally visited the jobsite to speak to Martinez and Estok because the jobsite was close to both Respondent's office and his own home.

promise of benefits, a threat of unspecified reprisals, and a coercive interrogation, in violation of Section 8(a)(1) of the Act. Respondent argues that Gupta and Hadiyan's remarks were permissible.⁸ I find that the evidence overall substantiates the Complaint's allegations.

5 It is well-settled that employers are generally prohibited from soliciting employee
grievances during union organizing campaigns, when the solicitation is accompanied by an
implicit or explicit promise to remedy the grievances, thereby conveying to the employees that
union representation is not necessary. *Albertson's, LLC*, 359 NLRB No. 147 at p. 1-2 (2013);
10 *Alamo Rent-A-Car*, 336 NLRB 1155 (2001). While the solicitation of grievances is not in and of
itself unlawful, it engenders the inference that the employer is promising to remedy the concerns
identified by the employees. *Albertson's, LLC*, 359 NLRB No. 147 at p. 2. Where an employer
has an ongoing practice and policy of soliciting employee grievances or complaints, the
employer may continue to do so during an organizing campaign. *Wal-Mart Stores, Inc.*, 339
15 NLRB 1187 (2003); *Maple Grove Health Care Center*, 330 NLRB 775 (2000), *citing Capitol EMI*
Music, 311 NLRB 997, 1007 (1993), *enf'd* 23F.3d 399 (4th Cir. 1994). However, a "significant
deviation" during an organizing campaign from the employer's customary practice in terms of
solicitation of grievances makes an inference that the employer will remedy them "particularly
compelling." *Albertson's, LLC*, 359 NLRB No. 147 at p. 2, *citing Center Service System*
Division, 345 NLRB 729, 730 (2005), *enf'd in relevant part*, 482 F.3d 425 (6th Cir. 2007).

20 As an initial matter, the evidence establishes that Gupta and Hadiyan made statements
soliciting grievances from White at the September 26 meeting, six days after the petition for a
representation election was filed. Hadiyan specifically told White that "the reason that I asked
so we could talk in here, is we want to find out why is it that you're unhappy," and asked White
25 "Is there anything that we could do?" and "So tell me, is there anything else that you're unhappy
about?" Gupta asked White "Do you have any other issues besides [the reimbursements]?" and
told White that if he had "certain ideas that you have that you want to implement," or "some
suggestions," "we can always consider them and see if we can implement them." Such
statements were clearly intended to elicit information from White regarding dissatisfaction with
30 his terms and conditions of employment.

Furthermore, the evidence does not establish, as Respondent contends, that
Respondent had a past practice of soliciting grievances from its employees, or from White in
particular, which it innocuously continued on September 26. For example, there is no evidence
35 that Respondent had any established program which included solicitation of employee
grievances on a regular basis prior to the filing of the petition, which it simply continued
thereafter. See *Wal-Mart Stores, Inc.*, 339 NLRB at 1187-1188 (solicitation of grievances in the
context of employer's long-standing "Coaching By Walking Around Program" permissible;
increased manager involvement in program attributable to employer campaigning).

40 Nor does the evidence establish that the September 26 meeting was part of a sequence
of events designed to solicit and address employee grievances which began prior to the filing of

45 ⁸ Respondent argues that the current Acting General Counsel's appointment was constitutionally
infirm, and that the Acting General Counsel therefore lacked the authority to issue and prosecute the
Complaint in this matter, based upon *NLRB v. Enterprise Leasing Co. Southeast, LLC*, --- F.3d ---, 2013
WL 3722388 (4th Cir. 2013), and *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3rd Cir.
2013), cited in *Hooks v. Kitsap Tenant Support Services, Inc.*, --- F.Supp. ---, 2013 WL 4094344 (W.D.
50 Wash 2013). The Board has rejected such arguments in previous cases, noting that at least three other
Circuits have reached a different conclusion. See *Bloomingdales, Inc.*, 359 NLRB No. 113 (2013);
Belgrove Post Acute Care Center, 359 NLRB No. 77 (2013).

the representation petition. *See MacDonald Machinery Co.*, 335 NLRB 319, 319-320 (2001) (post-petition solicitation of grievances continued a series of efforts, initiated prior to the petition's filing, to correct problems in employer's operation). The evidence establishes that Gupta, Hadiyan and White had discussed White's reimbursement for expenses in the past.

5 However, the evidence also establishes that the only previous discussions regarding White's terms and conditions of employment addressed this specific issue, which was of ongoing concern (Tr. 75-77, 206). On September 26, by contrast, the discussion of White's reimbursement for expenses was concluded prior to Hadiyan's stating, "we want to find out why is it that you're unhappy," and asking White "Is there anything that we could do?" Hadiyan
10 asked White, "Do you have any other issues besides this," and White said no, "I got \$95 and I thought I was...supposed to get 125, and that was pretty much it." Nevertheless, Hadiyan resumed his solicitation of grievances minutes later, asking White "So tell me, is there anything else that you're unhappy about?" Gupta also told White that if there were "certain ideas that you have that you want to implement, you think is better for the Company and better for you, we are
15 here to listen to those ideas." As a result, the September 26 meeting went far beyond any previous series of discussions regarding White's reimbursement for expenses, and did not constitute a past practice of grievance solicitation or part of a sequence of events which began prior to the filing of the petition.

20 For all of the foregoing reasons, I find that Gupta and Hadiyan's comments to White during the September 26 meeting constituted an unlawful solicitation of grievances and promise of benefits, in violation of Section 8(a)(1) of the Act.

25 The evidence further establishes that Hadiyan threatened White with unspecified reprisals during the September 26 meeting. After telling White that they had called him to the meeting to "find out why is it that you're unhappy," Hadiyan told White, "I prefer to have somebody who is happy in here," "I prefer for that person not being here if they're not happy," and "if they don't want to work for us, I don't want to force anybody to stay here and work for us." As discussed previously, Gupta had known from the inception of White's employment that
30 he was a member of Local 25. The Board has long held that employer suggestions that union supporters who are "unhappy" find other employment violate Section 8(a)(1) of the Act. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, at p. 1-2 (2011), *remanded in part on other grounds*, 701 F.3d 710 (D.C. Cir. 2012) (statement that if employee did not support employer's policies "this wasn't the place for him" and "there were other jobs out there" implied threat violating Section 8(a)(1)); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006)
35 (manager's statement that if employee was "unhappy here" then "Maybe this isn't the place for you...there are a lot of jobs out there" unlawful implied threat of discharge); *Paper Mart*, 319 NLRB 9 (1995) (president's statement that if employee "was not happy he could seek employment elsewhere" implicit threat of discharge). As a result, the evidence establishes that
40 Hadiyan threatened White with unspecified reprisals during the September 26 meeting, in violation of Section 8(a)(1) of the Act.

45 Finally, the evidence establishes that Gupta and Hadiyan coercively interrogated White during the September 26 meeting. The Board determines whether questioning regarding union activities is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer's hierarchy, the place and method of questioning, and the truthfulness of the employee's answer. *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17 (2010), *enfd*, 661 F.3d 1139 (D.C. Cir. 2011); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board also considers whether the
50 employee involved was an open supporter of the union at the time the questioning occurred. *Boulder City Hospital*, 355 NLRB No. 203 at p. 1, 9 (2010); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), *enfd*, 531 F.3d 321 (4th Cir. 2008) (citing cases).

Here, the majority of these factors militate in favor of a finding that Gupta and Hadiyan's questions regarding the status of White's union membership were impermissibly coercive. Gupta is Respondent's owner and highest level manager, and there is no evidence of any personal relationship between Gupta, Hadiyan and White which would potentially ameliorate the coercive impact of the questioning. See *Boulder City Hospital*, 355 NLRB No. 203 at p. 9 (questioner was a high ranking manager); *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17 (questioning impermissible where no evidence of personal friendship between agent and employees); compare *Smithfield Packing*, 344 NLRB 1, 2 (2004), *enf'd*, 447 F.3d 821 (D.C. Cir. 2006). In addition, the questioning immediately followed Gupta and Hadiyan's unlawful solicitation of grievances and Hadiyan's threat of unspecified reprisals, discussed above. See *Evergreen America*, 348 NLRB at 208 (other unlawful conduct accompanying interrogation strongly indicative of questioning's coercive nature); *Parts Depot*, 332 NLRB 670, 673-674 (2000), *enf'd*, 24 Fed.Appx. 1 (D.C. Cir. 2001). As a result, the evidence does not indicate that Gupta was simply attempting to learn about the logistics of operating a union shop, as Respondent contends. The more plausible conclusion to draw from the sequence of events is that after Hadiyan suggested to White that if he was unhappy he should leave Respondent's employ, Gupta and Hadiyan were interested in determining whether White was current in his union dues payments so that he could find other employment with a company under contract with Local 25 – or, as Hadiyan put it, "Would you go back if they called you? I'm telling you now that you would be crazy if you don't go back."

Finally, the evidence establishes that White informed Respondent that he was a member of Local 25 at the inception of his employment, so that as of September 26, Gupta was aware that White was a union member. The evidence further indicates that White answered the questions put to him truthfully. However, Gupta and Hadiyan's questions probed the specific status of White's dues payments to the Union, not a matter that White had previously disclosed. In addition, Hadiyan continued questioning White regarding his dues payments, even in the face of White's hesitation and the discomfort evident from his evasive answers.⁹ *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98 at p. 1, fn. 3, and at p. 21 (2013) (coercive nature of interrogation evinced by employee's "ambivalent" answer to question regarding union); *Wynn Las Vegas, LLC*, 358 NLRB No. 80 at p. 3 (2012) (evasive response and attempt to avoid providing information support a finding of coercive interrogation). Hadiyan's persistence in this regard further indicates that his questioning was coercive. *Boulder City Hospital*, 355 NLRB No. 203 at p. 9.

For all of the foregoing reasons, the evidence establishes that Gupta and Hadiyan coercively interrogated White regarding the status of his membership and dues payments to Local 25, in violation of Section 8(a)(1) of the Act.

B. The Objections to Conduct Affecting the Results of the Election

In its objections to conduct affecting the results of the election, the Union contends that Respondent "has engaged in unfair labor practices by interrogating and threatening employees about their union activities," referring to Gupta and Hadiyan's statements to White as discussed

⁹ For example, when repeatedly asked by Hadiyan whether he had paid his dues, White responded, "I don't know," and "I'm telling you I don't know." Hadiyan then questioned White regarding the precise manner in which dues could be paid, and what arrangement White in particular had established.

above.¹⁰ I have found that these statements included a threat of reprisals and a coercive interrogation in violation of Section 8(a)(1), and Gupta and Hadiyan's meeting with White occurred on September 26, during the critical period. Nevertheless, I find that given all of the circumstances here the unfair labor practices do not warrant setting aside the results of the election.

The Board's "general policy" is to direct a new election "whenever an unfair labor practice occurs during the critical period." *Columbus Transit, LLC*, 357 NLRB No. 146 at p. 2 (2011). However, the Board will decline to set aside an election "where it is virtually impossible to conclude that the misconduct could have affected the election results." *Columbus Transit, LLC*, 357 NLRB No. 146 at p. 2, *quoting Clark Equipment Co.*, 278 NLRB 498, 505 (1986). The Board evaluates a number of factors in order to determine the ultimate impact of unfair labor practices during the critical period, including the number and severity of the violations, the extent of their dissemination, the number of affected employees, the size of the bargaining unit, and the violations' proximity to the election. *Columbus Transit, LLC*, 357 NLRB No. 146 at p. 2; *Bon Appetit Mgt. Co.*, 334 NLRB 1042, 1044 (2001). In the context of this analysis, the Board does not presume that threats and other objectionable statements were disseminated, but places the burden of proof on the objecting party. See *Sanitation Salvage corp.*, 359 NLRB No. 130 at p. 1-2 (2013).

Here, there is no evidence whatsoever that Gupta and Hadiyan's unlawful statements to White were disseminated in any way, to any other employee, prior to the election on November 15. No other employee was present during Gupta and Hadiyan's meeting with White. There is no evidence that White discussed Gupta and Hadiyan's comments with any other bargaining unit member, or that other bargaining unit members learned of Gupta and Hadiyan's statements in any other manner. In addition, it is undisputed that White left Respondent's employ of his own volition on October 5, almost 6 weeks before the election took place, and the parties therefore agreed that he was ineligible to vote. I recognize that the bargaining unit and the number of eligible voters here is smaller than those confronted by the Board in other cases involving this issue. See *Sanitation Salvage Corp.*, 359 NLRB No. 130, at p. 1-2; *Columbus Transit, LLC*, 357 NLRB No. 146 at p. 2, fn. 6. However, given that White was not eligible to vote in the election and the lack of any evidence that Gupta and Hadiyan's unlawful statements were disseminated beyond him, there is no possible way that Respondent's unfair labor practices could have affected the results of the election. As a result, I find that Respondent's unlawful conduct could not have had any impact on the election results, and overrule the Union's objection.

C. The Challenged Ballots of Steele, Martinez, and Estok

At the representation election, the ballots of Steele, Martinez, and Estok, who were laid off on October 19, were challenged because their names did not appear on the *Excelsior* list. The Union contends that Steele, Martinez, and Estok were eligible to vote because their layoffs were only temporary, and that their ballots should therefore be opened and counted. Respondent argues that Steele, Martinez, and Estok were not eligible to vote, in that they were permanently laid off and had no reasonable expectation of recall.

¹⁰ The Charging Party also contended in its objection that Martinez, Steele, and Estok were laid off in retaliation for their union support and activities. As discussed above, these allegations were dismissed by the Regional Director in connection with Case No. 22-CA-093446, and as such the Regional Director determined that this portion of the objection did not raise substantial and material issues with respect to conduct affecting the results of the election, and recommended that it be overruled.

In order to be eligible to vote, an employee who has been laid off must have a reasonable expectation of recall in the near future as of the payroll eligibility period. *Pavilion at Crossing Pointe*, 344 NLRB 582, 583 (2005). In order to determine whether an employee had a reasonable expectation of recall, the Board evaluates several factors, including what the employee was told regarding the likelihood of recall, the circumstances surrounding the layoff, and the employer's past experience in laying off employees and future plans. *Pavilion at Crossing Pointe*, 344 NLRB at 583; *MJM Studios of New York*, 338 NLRB 980 (2003). The burden of proof to establish that a layoff was permanent as opposed to temporary, and that the employee had no reasonable expectation of recall, lies with the party arguing that the employee is ineligible to vote. *Pavilion at Crossing Pointe*, 344 NLRB at 584; *Laneco Construction Systems*, 339 NLRB 1048, 1048-1049 (2003).

The evidence overall establishes here that the employees laid off on October 19 did not have a reasonable expectation of recall. Gupta credibly testified that the current recession had engendered a downturn in Respondent's business due to increased competition among contractors, ultimately necessitating the layoff of Steele, Martinez, and Estok. New Jersey State tax filings confirm that Respondent did not hire anyone in 2012 after the layoff, and support Gupta's testimony that no sheet metal workers have been hired or contracted for work since October 19 (C.P. Ex 5). Documentary evidence further corroborates Gupta's testimony regarding additional layoffs earlier in 2012, and confirms Gupta's contention that he selected Steele, Martinez and Estok for layoff due to their low seniority (R.S. Ex. 2). Furthermore, it is undisputed that Respondent's business is not seasonal in nature. The record evidence therefore establishes that Steele, Martinez, and Estok were laid off due as part of "a general, long-term downsizing of [Respondent's] work force," supporting the conclusion that they did not have a reasonable expectation of recall in the near future.¹¹ *Pavilion at Crossing Pointe*, 344 NLRB at 583, citing *Monroe Auto Equipment*, 273 NLRB 103, 106 (1984).

Furthermore, I credit the testimony of Gupta and Yanez that they followed the script prepared by their attorney, and thus told Steele, Martinez, and Estok that Respondent had no additional work for them and had to let them go, and that if Respondent needed employees in the future it would advertise, and they were welcome to apply. Martinez confirmed that Gupta and Yanez told him that he "could try in another month" to call Respondent, and could "reapply" if Respondent obtained additional work or became "busy." Although Steele testified that Yanez told him that "when things pick back up, we'll give you a call," his recollection on cross-examination was significantly less specific (Tr. 121). As a result, the balance of the credible evidence establishes that Gupta and Yanez did not convey to Steele and Martinez the impression that they would be recalled to work. See *Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998) (employees had no reasonable expectation of recall after being told that layoffs were "indefinite" with no "firm and realistic" recall date, and that chances for recall "depended" because "things could change"); see also *MJM Studios of New York*, 338 NLRB at 981 (employees did not have a reasonable expectation of recall based upon supervisors' having "mentioned" that "possibility"). Gupta and Yanez's statement that the employees could apply for unemployment benefits and that Respondent would deal with the paperwork promptly further establishes that the employees had no reasonable expectation of recall. *Pavilion at Crossing Pointe*, 344 NLRB at 583; *Osram Sylvania, Inc.*, 325 NLRB at 760.

¹¹ Although the evidence establishes that Respondent continued to solicit new business, submitting bids for additional projects, this does not establish a reasonable expectation of recall in light of the evidence regarding Respondent's business situation overall. *MJM Studios of New York*, 338 NLRB at 981.

Finally, the testimony of Levie Steele regarding his previous layoff in March and return to work in September does not militate in favor of a conclusion that Steele, or the other employees, had a reasonable expectation of recall when laid off in October. Steele testified that when he was laid off in March he was told that he would be recalled by Respondent when work picked up. However, Steele also stated that he only returned to work in September after he contacted Hadiyan to determine whether Respondent had additional work available. The evidence therefore does not establish that Steele was recalled by Respondent in September, and there is no other evidence regarding Respondent's procedures in connection with past layoffs. As a result, there is no evidence regarding past layoffs which would elucidate whether the employees laid off on October 19 had a reasonable expectation of recall.¹²

For all of the foregoing reasons, the evidence overall establishes that Steele, Martinez, and Estok did not have a reasonable expectation of recall in connection with their layoff on October 19. As a result, I recommend that the challenges to their ballots be sustained.

Conclusions of Law

1. The Respondent, A&B HVAC Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers Local Union 25 is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees regarding their Union support and activities, Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with unspecified reprisals in retaliation for their support for and activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

5. By soliciting employee grievances and promising benefits if the employees refrained from supporting or engaging in activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

6. The above-described unfair labor practices affect commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

7. The Charging Party's objection in Case No. 22-RC-089630 is without merit and must be dismissed.

The Remedy

Having found that Respondent violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes. Respondent shall be ordered to post a notice informing its employees of its obligations herein.

¹² I also find that the evidence overall establishes that Steele was not eligible for the benefits available to Respondent's permanent employees, as he did not complete the required 90-day eligibility period.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended¹³

ORDER

Respondent A&B HVAC Services, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals in retaliation for their support for and activities on behalf of Sheet Metal Workers Local Union 25.

(b) Coercively interrogating employees regarding their support for and activities on behalf of Sheet Metal Workers Local Union 25.

(c) Soliciting employee grievances and promising benefits if the employees refrain from supporting or engaging in activities on behalf of Sheet Metal Workers Local Union 25.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at the facility at Somerset, New Jersey, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

¹³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

3. It is also ordered that the objection filed by the Charging Party in Case No. 22-RC-089630 be overruled, and that the case be remanded to the Regional Director for the purpose of further processing.

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Dated: Washington, DC September 19, 2013

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Lauren Esposito
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten you with unspecified reprisals in retaliation for your support for or activities on behalf of Sheet Metal Workers Union Local 25.

WE WILL NOT coercively interrogate you regarding your support for or activities on behalf of Sheet Metal Workers Union Local 25.

WE WILL NOT solicit grievances from you and promise benefits if you refrain from supporting Sheet Metal Workers Union Local 25.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

A&B HVAC SERVICES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor
Newark, New Jersey 07102-3110
Hours: 8:30 a.m. to 5 p.m.
973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.